No. 2421

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR H. BRANDT, as trustee of F. S. MAYHEW, in bankruptcy,

Petitioner,

vs.

F. S. MAYHEW and MRS. F. S. MAYHEW, husband and wife,

Respondents.

In the Matter of F. S. MAYHEW,

In Bankruptcy.

PETITIONER'S OPENING BRIEF ON PETITION FOR REVISION.

R. H. CROSS,
Attorney for Petitioner.

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Statement of the Case.

There is no controversy concerning the facts in this case. Briefly enumerated they are, in their chronological order, as follows:

On the 18th day of April, 1912, F. S. Mayhew, and his wife, transferred and conveyed to one Wil-

lard O. Wayman, certain real property situated in the County of San Mateo, State of California, upon which they had been living. This conveyance was by deed and was a part of a general assignment of his assets for the benefit of his creditors. On August 17th, 1912, a petition in involuntary bankruptcy against F. S. Mayhew was filed in the District Court, the act of bankruptcy charged by the petitioning creditors, being the conveyance to Willard O. Wayman above described. On October 8th Mayhew was duly adjudicated a bankrupt by the District Court, and the administration of his estate referred to Armand B. Kreft, referee, at San Francisco.

On November 4th, 1912, Mrs. Mayhew, the wife of the bankrupt, recorded with the county recorder of San Mateo County, State of California, a declaration of homestead upon the real property which she jointly with her husband had on April 18th, transferred to Willard O. Wayman. On November 20th, 1912, Mrs. Mayhew filed a petition with the referee for an order setting apart as exempt the dwelling house and land upon which she had filed the declaration of homestead.

On December 13th, 1912, the first meeting of creditors was held and Arthur H. Brandt duly elected trustee. On December 20th, 1912, Willard O. Wayman transferred and surrendered to the trustee the property conveyed to him by the Mayhews.

On January 10th, 1913, the trustee filed with the referee an inventory of the property and assets of the estate of the bankrupt which had come into his possession. This inventory included as an asset of the bankrupt the real property situated in the County of San Mateo, heretofore referred to. On February 17th, 1913, the bankrupt made his appearance and filed his schedules of his creditors and of his property. In these schedules under the heading provided for that purpose, he made claim to an exemption of $5000.00 in value of the San Mateo real estate upon which his wife had filed the declaration of homestead.

The trustee refused to set aside the homestead claiming that the bankrupt was not entitled thereto. On February 2nd, 1914, the referee made an order granting and allowing the claim to the exemption, and ordering and directing the trustee to set aside a homestead to the bankrupt to the value of $5000.00 and to pay and deliver said sum to said bankrupt out of and from the proceeds of the sale of the real property when the sale should be made, a sale at that time being pending. On February 15th, 1914, the trustee filed his petition for the review of the referee's order. On February 11th, 1914, the referee certified the questions involved to the District Court. On May 7th, 1914, the District Court affirmed the order of

the referee granting and allowing the homestead exemption as claimed by the bankrupt. It is from this order of the District Court affirming the order of the referee that this petition for revision is taken.

Questions Presented.

Upon the uncontradicted facts enumerated above, two clean cut questions of law are presented:

1. Is a bankrupt in the State of California entitled to claim a real estate homestead exemption where neither he nor any one in his behalf has made and recorded a declaration of homestead as required by the state statutes, prior to his adjudication in bankruptcy?

2. Assuming that he would otherwise be so entitled, is he precluded from making such a claim by a voluntary conveyance of the real property for the benefit of creditors made prior to the petition and adjudication in bankruptcy, the property being subsequently recovered by the trustee?

Both of these questions are of considerable importance in the administration of the bankruptcy law in the State of California, not only to the creditors in the pending case but to creditors generally. It is submitted that the first question must be answered in the negative and the second in the affirmative.

Argument.

I.

A BANKRUPT IN THE STATE OF CALIFORNIA IS NOT ENTITLED TO CLAIM A REAL ESTATE HOMESTEAD EXEMPTION WHERE NO DECLARATION OF HOMESTEAD HAS BEEN MADE AND RECORDED AS REQUIRED BY THE STATE LAWS, PRIOR TO HIS ADJUDICATION.

This general proposition divides itself for convenience in discussion, into two specific propositions, viz.:

A. That a bankrupt under such circumstances is not entitled to claim the exemption irrespective of any consideration of the bearing and effect of Section 47A (2) of the Bankruptcy Act as amended in 1910.

B. That if he were otherwise entitled to claim such an exemption he is precluded from so doing by the provisions of the amendment.

We will consider these two specific propositions separately and in the order stated.

A.

No Statutory Declaration of Homestead Having Been Filed Prior to Adjudication, a Bankrupt in the State of California is Not Entitled to Claim an Exemption, and This Irrespective of the Bearing and Effect of Section 47A (2) of the National Bankruptcy Act.

There are just two statutes or sets of statutes of the State of California under which a bankrupt can claim a real estate homestead exemption. These

are (1) The general homestead law set out as Title V, Part IV of the Civil Code; and (2) Paragraph 64 of Article 10 of the Insolvent Act of 1895.

The general homestead law of the state as contained in Title V, Part IV of the Civil Code defines homesteads, the way they may be secured, and the extent of the exemption allowed. Section 1237 of Chapter I of this title provides that the homestead shall consist of the dwelling house in which the claimant resides and the land on which the same is situated, selected as provided in this title. Section 1238 provides that in case the claimant is married, the homestead may be selected from the community property or the separate property of the husband, or, with the consent of the wife, from her separate property. Sections 1240 and 1241 provide that the homestead is exempt from execution or forced sale

> "except in satisfaction of judgments obtained (1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises; (2) On debts secured by mechanics' materialmen's or vendors' liens upon the premises; (3) On debts secured by mortgages on the premises executed and acknowledged by husband and wife; and (4) On debts secured by mortgages executed and recorded before the declaration of homestead was filed for record."

Section 1242 provides that a homestead cannot be conveyed or encumbered unless the instrument is executed and acknowledged by both husband and

wife. Sections 1243 and 1244 state the circumstances and method by which a homestead may be abandoned. Sections 1245 to 1259 inclusive, set out the proceedings by which the excess in value of the property over the homestead claimed may be reached by creditors. Section 1260 provides that homesteads may be selected and claimed of not exceeding $5000.00 in value by the head of a family, or of not exceeding $1000.00 in value by any other person. Section 1261 defines the head of a family as "(1) the husband when the claimant is a married person, * * *". Sections 1262, 1263, 1264 and 1265, respectively, provide as follows:

> "1262. In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.
>
> 1263. The declaration of homestead must contain:
>
> 1. A statement, showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;
>
> 2. A statement that the person making it is residing on the premises, and claims them as a homestead;
>
> 3. A description of the premises;
>
> 4. An estimate of their actual cash value.

> 1264. The declaration must be recorded in the office of the recorder of the county in which the land is situated.
>
> 1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. * * *"

Space does not permit setting out all the provisions of the general homestead law of the state. From the sections quoted, however, it is at once apparent that the recording of a formal declaration of homestead with the county recorder is a condition precedent to the right to claim a homestead exemption. No such right exists unless the provisions of the statutes have been complied with.

By Section 70A of the Bankruptcy Act, the trustee of the estate of a bankrupt,

> "upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he by any means could have transferred or which might have been levied upon and sold under judicial process against him."

As no declaration of homestead had been filed pursuant to the state laws, prior to the date of adjudication, it would seem to follow logically that at that date, pursuant to the provisions of this section, title vested in the trustee. The title having passed to the trustee as of that date, a subsequent attempt to perfect the homestead under the state laws would be nugatory.

There is no occasion for an elaborate argument on this proposition, since the United States Circuit Court of Appeals for the Eighth Circuit has, in a well considered opinion, carefully and exhaustively reviewed it. In the case of In re Youngstrom, 18 A. B. R. 572, 153 Fed. 98, that court held that where a bankrupt had failed to cause the word "homestead" to be entered in the margin of the record title to his property, as provided by the Colorado laws, before adjudication, he could not claim his exemption. After an extensive consideration of the questions involved, the court said:

> "We conclude that a claimed exemption otherwise recognized by the State law, but to which the bankrupt had not become entitled at the time of the filing of the petition, or at the time he was adjudicated a bankrupt, is not within the saving and protecting clause of the Bankruptcy Act, and cannot be allowed or set apart therein."

There are one or two decisions by the District Courts which seem to hold that a bankrupt may, even after adjudication, perfect his homestead under the state law. (In re Fisher, 142 Fed. 205; In re Culwell, 165 Fed. 165.) The reasoning of these cases, however, is unsatisfactory, and must give way to the more logical view and the greater weight of the decision in the case of In re Youngstrom. It follows, therefore, that so far as the bankrupt's claim to exemption was based upon the provisions of the general homestead law of California,

he was precluded by his failure to perfect his right under the state law prior to his adjudication.

Paragraph 64 of Article 10 of the Insolvent Act of the State of California of 1895 contains the following provision:

> "It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent, such real and personal property as is, by law, exempt from execution; *and also a homestead, in the manner provided in Section 1465, of the Code of Civil Procedure.*"

Section 1465 of the Code of Civil Procedure referred to in this provision of the Insolvent Act pertains to probate proceedings, and is as follows:

> "Upon the return of the inventory, or at any subsequent time during the administration, the court may on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded; provided such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate and set apart, the cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children; in the manner provided

> in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent."

It will be noticed that by the provisions of the Insolvent Act and of Section 1465, Code of Civil Procedure, it is not necessary that a formal declaration of homestead be made and recorded as provided in the general homestead law of the state. The homestead under these sections is in the nature of a "probate" homestead and may be set aside even though none had therefore been selected. The Insolvent Act, therefore in terms, adds to the general exemption laws on execution, a homestead exemption, if it can properly be designated an "exemption", that is peculiar to that Act.

Section 6 of the Bankruptcy Act provides as follows:

> A. "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have their domicile, for the six months or the greater portion thereof immediately preceding the filing of the petition."

Was the bankrupt entitled to claim a homestead exemption under the provisions of the Insolvent Act? The answer to this question involves a consideration of what is meant by (1) The term "exemptions" as used in Section 6 of the Bankruptcy Act, quoted supra; and (2) the words "in force" as used therein.

It is submitted that the word "exemptions" as employed in Section 6 is restricted to exemptions "from judicial process on execution", and does not apply to exemptions that are peculiar to the state insolvency laws. The authorities are very few in which Section 6 has been construed or interpreted with reference to this question. This undoubtedly is due to the fact that ordinarily the exemptions provided for under the general laws of the state are the exemptions provided for in the state insolvency laws. The expressions of the courts, however, would seem to indicate that they consider the word as applicable to "exemption from execution". Thus, in Richardson v. Woodward, 104 Fed. 874, it was said:

> "The intention was to adopt the State laws governing exemptions. Hence, the courts of bankruptcy will look to be governed by the constitutions, statutes and decisions of the several states and territories, in deciding who is entitled to exemptions and the amount and species of property to be exempt. *A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the State law, and none other.*"

See also:

In re Wunder, 133 Fed. 822;

Loveland on Bankruptcy, Sec. 415, 11th Ed.

This view is strengthened by a consideration of the provisions of the Bankruptcy Act of 1867. Section 14 of that Act contained a specific enumeration of the property to which the bankrupt was entitled

as exempt, specifying particularly household and kitchen furniture, wearing apparel and the uniform, arms and equipments of persons who had been in the military service of the United States. It then provides as follows:

> "and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such exemption laws in force in the year eighteen hundred and sixty four".

At the time the Bankruptcy Act of 1898 was passed, Congress had before it the decisions of the courts construing the Act of 1867. These decisions were uniformly to the effect that the Bankruptcy Act of 1867 had *ipso facto* suspended all state legislation upon the subject of bankruptcy and insolvency. (Loveland on Bankruptcy, 3rd Ed., Sec. 12, page 27.) When, therefore, in the Act of 1898, Congress provides for the allowance to bankrupts "of the exemptions which are prescribed by the state laws in force" it must be taken that its only purpose was to state in a general way what was stated specifically in the Act of 1867, and that by its very use of the words "in force" it excluded exemptions peculiar to the state insolvency laws. As a matter of fact Congress virtually defines the term as used in Section 6, by Section 67, subdivision E,

where in referring to fraudulent transfers it is provided that

> "all property of the debtor conveyed, transferred, assigned or encumbered, as aforesaid, shall, if he be adjudged as bankrupt, *and the same is not exempt from execution, and liability for debts by the law of his domicile,* be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings, or otherwise, for the benefit of the creditors."

Some of the above considerations apply with equal force to the construction of the words "in force" as used in Section 6. Not only in the Act of 1867 but also under the Act of 1898, it is well settled by the decisions, both federal and state, that the effect of a national bankruptcy law is to suspend the operation of any state bankruptcy or insolvency law regulating the assignment and distribution of the property of insolvents and affecting the same persons, property and rights that would be affected by proceedings under the Bankruptcy Act. (Loveland on Bankruptcy, 3rd Ed., page 23, Sec. 12.)

> "The authorities were in some conflict at one time as to the extent of the suspension of the operation of the State Insolvency Laws, but the great weight of the decisions now is that after the passage of the Bankruptcy Act the Insolvency Laws are in complete abeyance."
>
> 5 Cyc., page 241, Note 17.

Since, therefore, the State Insolvent Act of 1895 was completely suspended by the Bankruptcy Act of 1898, and since the bankrupt could only claim that homestead exemption in insolvency proceedings in the state court, it would seem to follow logically that the exemption is not one prescribed by a state law "in force".

If, however, it be assumed for the purpose of argument that the State Insolvent Act is not in complete abeyance by reason of the enactment of the national bankruptcy law it must nevertheless be conceded that, at all events, it is suspended as to all parts in conflict with the national law. Consequently, even were it assumed that the right accorded by the provisions of the Insolvent Act is an "exemption", as that term is used in Section 6 of the Bankruptcy Act, yet if that section is in conflict with the provisions of that Act it is not "in force". A brief consideration of the administrative features and the scheme of title provided for in the Insolvent Act will suffice to show that they are inconsistent with the theory and provisions of the Bankruptcy Act.

Section 1465 A of the Code of Civil Procedure provides that on the filing of a petition for the setting apart of the homestead provided for in Section 1465, which latter section is referred to by the Insolvent Act, the court

> "must set the petition for hearing and give notice thereof by causing notices to be posted in at least three public places in the county,

> one of which must be at the place where the court is held, containing the name of the decedent, the name of the petitioner, the nature of the application, and the time at which the same will be heard."

The same section further provides that:

> "Such notices must be given at least ten days before the hearing, and a copy thereof must be mailed at least ten days before the day appointed for the hearing to the executor or administrator, if he be not the petitioner, and to any person named as co-executor or co-administrator, not petitioning, addressed to them at their places of residence, if known, and if not known, then to the county seat of the county where the proceedings are pending. Proof of such posting and mailing must be made at the hearing."

There is no provision in the Bankruptcy Act for the adoption of the administrative procedure required by the state laws. It is obvious that there is no place in bankruptcy proceedings for the notices provided in the sections just cited. Since the right under the Insolvent Act could only be perfected by following the statutory requirements, and since that procedure is not adopted by the Bankruptcy Act, it follows that there is no way in which the right can be perfected in the bankruptcy courts.

In the second place, it will be noticed that Section 1465, Code of Civil Procedure, provides that "*the court* must select, designate and set apart and cause to be recorded, a homestead". Under this provision it is obvious that the claimant acquires no absolute

right, even by his petition, to any particular piece of property, if, as a matter of fact, there were more than one piece available. The designation of any particular piece rests entirely in the discretion of the court. This is totally at variance with the theory of the Bankruptcy Act, which gives no jurisdiction to the bankruptcy court over exempt property, except for the purpose of setting it aside. The choice of property as exempt is a matter that rests entirely with the bankrupt, and the bankruptcy court cannot help him to perfect it.

Further, the provision last quoted, is at total variance with the scheme of title as provided for in the Bankruptcy Act. If the bankrupt had several pieces of property suitable for a homestead where would the title be vested during the time intermediate the filing of the petition and the designation of any particular piece by the court as a homestead? The Bankruptcy Act, as already stated, provides that the title passes to the trustee as of the date of adjudication. The only possible theory, therefore, on which the provisions of Section 1465 could be said to be consistent with the vesting of title under the Bankruptcy Act, would be by the fiction that title to the piece ultimately selected never departed from the bankrupt. Any such theory, however, would give rise to a "twilight zone" concerning the vesting of property in bankruptcy that is neither contemplated nor possible under the Act. There is no place in that Act for an undetermined title. The title vests in the trustee

as of the date of adjudication by the very terms of the Act, except as to property which is then exempt. It is that date which fixes the time of determining the exemptions, and it cannot be postponed, as provided in Section 1465, until some subsequent date.

The view that an exemption provided for by the state insolvency law, solely, is not available in bankruptcy where the proceedings necessary for its perfection are at variance with the theory and provisions of the Bankruptcy Act, is well set forth by Judge Lowell of the District Court of Massachusetts in the case of In re Anderson, 110 Fed. 141. In that case the bankrupt had made claim to an exemption provided for by the insolvency law of Massachusetts. (Pub. St. Mass. C. 171, Sec. 34.) Chapter 157, Section 99 of that law provided that the debtor should receive from the assignee $1.00 a day for his attendance on the judge. 2. That he should also be allowed out of his estate for the support of himself and family, not exceeding the sum of $3.00 per week for each member of his family, and not exceeding two months, and 3. "five per cent of the net produce of all his estate received by the assignee if such net produce after such allowance was sufficient to pay the creditors entitled to a dividend the amount of 50 per cent on their debts but the allowance not to exceed in the whole $500.00".

Judge Lowell held that it was impossible in view of the provisions of the Bankruptcy Act to allow such an exemption. He stated his reasons as follows:

"The bankrupt seeks to obtain the allowance given by the second sentence of the section above quoted. To do this, he must establish that the allowance to be made is one 'of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition'. Bankr. Act, Sec. 6. Precisely what meaning should be given to the word 'exemption' is difficult to determine in a case like this. *Hitherto the only exemptions allowed in this district have been those established by Pub. St. Mass. C. 171, Sec. 34, concerning goods exempt from execution,* which exemptions are dealt with by the Massachusetts insolvency act in section 46. Upon the whole, though with considerable doubt, I think that the allowances made by section 99 are not properly exemptions, within the purview of section 6 of the bankrupt act but are concerned with that part of the insolvency law *which is suspended in its operation by the passage of the bankrupt act.* We can hardly suppose that the debtor is entitled to receive from the trustee one dollar per day for his attendance, as provided in the first sentence of section 99, or that he is to be allowed 5 per cent on the net produce of his estate, if that estate pays a 50 per cent dividend to his creditors, as provided in the last sentence of the same section. The provision here in question which comes between the two just mentioned, may seem less objectionable, but one can hardly be enforced under the bankrupt act while the others are refused enforcement. *Moreover, it is to be observed that the allowance provided is at the discretion of the judge of probate, and it is doubtful if the bankrupt act was intended to substitute in any respect the discretion of the judge of the district court for that of the judge of probate.* True, if the allowance is denied, the bankrupt will get less from his own estate than if the bankrupt act had not

been enacted, and the insolvency law was still in force. *This result seems opposed to the general intent of section 6 of the bankrupt act, but in this case the result seems unavoidable.* The judgment of the referee is reversed, and the allowance to the bankrupt is denied."

In conclusion on this branch of the case, it is contended in view of the above authorities and considerations that, irrespective of any consideration of the bearing or effect of Section 47A (2) as amended in 1910, the bankrupt was not entitled to the homestead exemption claimed in his schedules. He was not entitled to make such claim under the provisions of the general homestead law of California because he had failed to perfect his claim under such state laws prior to adjudication. He could not claim the exemption under the Insolvent Act of 1895, for the reason that its provisions were neither in force nor such as are contemplated by the Bankruptcy Act. The order of the District Court was, therefore, for this reason, if for no other, erroneous.

B.

Assuming That the Bankrupt Would Otherwise Be Entitled to the Homestead Right Accorded by Paragraph 64 of the Insolvent Act of 1895 He is Precluded From Making Such Claim by Reason of the Operation and Effect of Section 47A (2) of the Bankruptcy Act as Amended in 1910.

Assuming for the purpose of argument that the right accorded under Section 64 of the Insolvent

Act is an "exemption" and a state law "in force", within the meaning of those words as used in Section 6, nevertheless it is contended that by reason of the effect of the provision of Section 47 A (2) of the Bankruptcy Act as amended in 1910, he was precluded from claiming it.

The direct provisions of the Insolvent Act as well as the decisions of the Supreme Court of the State of California, are to the effect that the homestead set apart under and pursuant to the provisions of the Insolvent Act are subject to all valid and legal liens existing on the property out of which the homestead is created. The 36th section of the Act provides that the property of the insolvent is to be surrendered to his creditors but makes the following proviso:

> "All legal mortgages and liens bona fide existing on such property at the time of the surrender as aforesaid, shall remain good and valid and may be enforced in the same manner as though no such surrender had been made."

In the case of Bowman v. Martin, 16 Cal. 215, the Supreme Court of the state held that under this provision a decree in insolvency designating and setting apart to an insolvent certain premises as a homestead, did not discharge or impair any lien that theretofore existed on the premises.

The same holding has been made with reference to liens existing on property set aside as probate

homesteads under the provisions of 1465 of the Code of Civil Procedure referred to in Section 64 of the Insolvent Act.

Estate of Orr, 29 Cal. 102;
Estate of MacAulay, 50 Cal. 544;
Schedt v. Heppe, 45 Cal. 437.

If it be assumed that the bankrupt was entitled to a homestead exemption under the general homestead laws, even in that case the homestead would, pursuant to Subdivision 1 of Section 1241, of the Code of Civil Procedure, quoted supra, be subject to any liens that existed on the premises.

In 1910 Congress amended Section 47 A (2) of the Bankruptcy Act. It now reads as follows, the portions added in 1910 being italicized:

> "Trustees shall respectively * * * (2) Collect and reduce to money the properties of the estates for which they are trustees under the direction of the court and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustee as to all property in the custody or coming into the custody of the bankruptcy courts shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*"

The amended portion of the section by its direct terms, puts the trustee as to all property in the cus-

tody or coming into the custody of the bankruptcy court, in the position of a creditor holding a lien by legal or equitable proceedings and as to all other property in the position of a creditor holding an execution returned unsatisfied. It would seem to follow therefore, logically, by the very terms of the amendment, that the trustee in the case at bar was in a position of a lien creditor as to the real property claimed by the bankrupt as a homestead. Since the trustee represents all the creditors of the estate his lien would extend to the entire indebtedness against the bankrupt. The result necessarily is that the bankrupt as against such a lien, cannot claim the exemption.

The referee took the position that the section should not be given such a construction since to do so would make it conflict with the provisions of Section 6 of the Bankruptcy Act. This position we assume, by reason of its affirmance of the order of the referee, was considered by the District Court as the proper one. The obvious answer to this position is, as we have heretofore pointed out, that the right accorded by the Insolvent Act is neither an "exemption" nor "in force". Assuming the contrary, however, an assumption which we have made for the purpose of discussing this question, we fail to see how the mere fact that the operation of Section 47 A (2) conflicts with the provisions of Section 6, justifies the court in refusing to give effect to the direct and unequivocal words of the

section, or in adding a modification or exception thereto.

The words of the amendment are clear and unambiguous. It states as to "all" property, etc., the trustee shall be deemed vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. There is no exception made either as to exempt property or any other property that might come into the custody of the bankruptcy court. As the provisions of the statute stand they are as applicable to exempt property as to other property administered in bankruptcy proceedings.

It is a cardinal rule of statutory construction that when the terms of a statute are plain and certain, nothing is left for construction or interpretation and that the statute will be enforced in all cases which clearly fall within its terms.

> "It is an elementary proposition that courts only determine by construction the scope and intent of a law when the law is ambiguous or doubtful. If a law is plain and within the legislative power, it declares itself, and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh, would make the judicial superior to the legislative branch of the government, and practically invest it with a law-making power. The remedy for a harsh law is not in interpretation, but in amendment or repeal."
>
> State v. Duggan, 15 R. I. 403, Atl. 787.

"In conformity with this general rule of statutory construction, the courts have held that no exceptions will be engrafted upon the plain words of a statute merely because, in the opinion of the court, such exceptions ought to be made or because such exceptions would be just and reasonable or wise and politic."

Barker v. Hebbard, 81 Mich. 267, 45 N. W. 964.

Davenport v. Hannibal, 120 Mo. 150, 25 S. W. 364;

Randall v. Richmond etc. Co., 104 N. C. 410, 10 S. W. 691;

Gilvert v. Dutruit, 91 Wis. 661, 65 N. W. 511;

U. S. v. Transmissouri Freight Association, 166 U. S. 290, 41 L. Ed. 1007;

Sturgess v. Crowninshield, 4 Wheaton 122, 4 L. Ed. 529.

Sutherland on "Statutory Construction" (Vol. II, page 701), thus sums up the rule:

"Cases cannot be included or excluded merely because there is intrinsically no reason against it. Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. Courts have, then, no powers to set it aside or evade its operation by forced or unreasonable construction. If it has been passed improvidently, the responsibility is with the legislature and not with the courts."

As suggested in the last quotation, if Congress did not intend that the amendment should affect exemptions in any way, the remedy lies not in the courts but with Congress. It is to be further borne in mind with reference to the immediate question that the amendment of 1910 to Section 47A was enacted subsequent to Section 6 of the Act, and therefore is controlling.

The result of thus giving full application to the provisions of the amendment is by no means as startling as at first glance it might seem. As heretofore stated, the exemption laws provided for in State Insolvency Acts are ordinarily the exemptions provided for in the general laws of the state. Since these general exemption laws refer uniformly to exemptions "on execution" it is obvious that they are in no wise affected by a provision that vests the trustee only with the powers of an execution creditor. The only possible cases in which the section could have any effect upon exemptions would be those isolated cases, of the nature of the case at bar, in which an exemption in addition to those prescribed by the general laws of the state, is added by the Insolvent Act, and possibly one case arising under the general laws relating to exemption on execution. Under the general laws of some of the states, property which would otherwise be exempt is held subject to execution on a judgment for the purchase price of such property. So far, therefore, as the amendment might be construed as putting the

trustee, as to all the claims against the bankrupt, in the position of a creditor holding "a judgment for the purchase price", it would necessarily affect his exemption rights. These are the only two cases that occur to us in which the amendment could possibly affect such exemptions. To read an implied exception into the Acts because of its possible bearing on these isolated cases is to ascribe to Congress an intention that in all probability never existed.

In the argument before the referee and the District Court, it was sought to confine the operation of the amendment to property other than exempt property, by adverting to the immediate purpose of Congress in passing the Act. It may be conceded that the immediate occasion for the passing of the amendment was the decision of the Supreme Court of the United States in the case of York Manufacturing Company v. Cassel, 201 U. S. 344. In that case it was held that the trustee was only in the position of the bankrupt, and accordingly that a lien evidenced by an unrecorded instrument was valid as against the trustee. This result was undoubtedly changed by the amendment in question, but it by no means follows that the amendment is to be limited in its operation solely to the case that occasioned its passage.

The federal courts since the passage of the amendment, when called upon to construe its operation and effect, have applied it without question to the various situations in which, by its direct terms, it was applicable. Thus it has been held that by

reason of its provisions, a trustee now has the power to maintain an action in trespass and recover damages arising from unlawful conspiracy entered into by the bankrupt and others prior to adjudication, to transfer and conceal moneys of the bankrupt, on the ground that such a right was possessed by an execution creditor (Sattler v. Sloninsky, 28 A. B. R. 729); that a trustee can sell the property of a bankrupt so as to divest the wife of the bankrupt of her dower interest, such right being accorded to execution creditors under the law of the state (In re Cordori, 30 A. B. R. 455, 207 Fed. 784); that under the terms of the amendment it is immaterial whether there are any "subsequent creditors" where by the state law an unrecorded conditional contract of sale is "void as to subsequent creditors", since the trustee is in the position of the most favored creditor under the local law (Farmers Co-operative Co. v. Barlow, 30 A. B. R. 190), and that by reason of the amendment the trustee is not only in the position of a judgment creditor holding a lien, but is in the position of a bona fide holder, and that consequently, a creditor cannot rescind as to him a fraudulent sale procured by the bankrupt, and cannot follow the goods in his hands (In re Whatley Bros., 29 A. B. R. 64).

These decisions would seem to indicate that in the opinion of the court the operation of the amendment is not to be confined solely to the situation which occasioned its passage. But more than this,

there are at least three cases in which the application of the amendment has affected the bankrupt's exemptions. These are the cases of In re Stern, 30 A. B. R. 694, 208 Fed. 488; In re Phillips, 31 A. B. R. 597, 209 Fed. 490, and In re Morris, 30 A. B. R. 319. In the two cases of In re Stern and In re Phillips, supra, the District Court for the Western Division of Ohio, and the District Court for the Western District of Washington, respectively, held that by reason of the status given to the trustee by the amendment, he was in the position not only of a creditor possessing a lien on property in the custody of the bankrupt, but that he was in the position of an execution creditor holding a judgment rendered for the purchase price thereof. In the former case the court limited the extent of the trustee's lien to the aggregate amount of the claims of those creditors who had sold the personal property. In the latter case, however, the lien was extended to the full amount of the bankrupt's indebtedness without distinction as to the nature of the claims of the various creditors. *In neither case did it appear that any of the creditors had procured a judgment for the purchase price of any of the property.* These decisions, therefore, are absolutely inconsistent with any theory that would confine and limit the effect of the amendment to property other than exempt property.

In the case of In re Morris, cited supra, the Circuit Court of Appeals for the Second Circuit held that by reason of the amendment the trustee

now has the right to maintain an action to recover the surplus income to which a bankrupt is entitled under a will. It had been held by the Court of Appeals of New York in the case of Butler v. Boudaine, 69 N. E. 1121, affirming a judgment of the Supreme Court of the state (82 N. Y. S. 773) that such surplus could only be reached on equitable proceedings by a creditor holding an execution returned unsatisfied. So far as it could not be reached by the ordinary creditors, therefore, it was an exemption that arose by reason of the laws of the state. Consequently the decision of the Circuit Court of Appeals is consistent only with the theory that in its opinion the direct provisions of 47A were to be given effect, notwithstanding the fact that it thereby affected a state exemption.

It is submitted, therefore, that the provisions of the amendment should not be restricted solely to the case that occasioned its passage, but that it must be given the full effect that its express provisions require, and this regardless of the fact that it may in one or two isolated instances affect the bankrupt's exemption. Accordingly, we conclude even on the assumption that the right accorded by Section 64 of the Insolvent Act is an "exemption in force", that the trustee was, by virtue of the provisions of the amendment, vested with a lien that was paramount to the bankrupt's claim of homestead exemption.

II.

THE BANKRUPT AND HIS WIFE HAVING VOLUNTARILY CONVEYED THE REAL PROPERTY IN QUESTION FOR THE BENEFIT OF THEIR CREDITORS PRIOR TO THE PETITION AND ADJUDICATION, HAVE THEREBY, IN ANY EVENT, PRECLUDED A CLAIM FOR HOMESTEAD EXEMPTION.

As heretofore stated, the bankrupt and his wife on the 18th day of April, 1912, conveyed the property out of which they subsequently claimed a homestead to one Willard O. Wayman for the benefit of the creditors of the bankrupt. This transfer was the act of bankruptcy charged by the petitioning creditors and upon which the adjudication was obtained. On the 20th day of December, 1912, after the appointment of the trustee, Willard O. Wayman transferred and surrendered the property so conveyed to him to the trustee.

It is contended by the trustee that by reason of this voluntary conveyance, the bankrupt is precluded from claiming a homestead exemption in bankruptcy. It must be conceded that while the question here presented has arisen frequently in the federal courts, there is by no means an unanimity of opinion concerning it. Some of the courts have held that where property has been transferred as a preference or for the benefit of creditors, and subsequently recovered or surrendered to the trustee, the bankrupt has lost his right to claim a homestead exemption. On the other hand, other cases have held that the bankrupt is not under such circumstances precluded from mak-

ing his claim. The following cases hold that no claim of exemption can be made:

In re Coddington, 126 Fed. 891; 11 A. B. R. 122;
In re Evans, 116 Fed. 909; 8 A. B. R. 730;
In re Long, 8 A. B. R. 591; 116 Fed. 113;
In re White, 109 Fed. 635; 6 A. B. R. 451;
In re Tollette, 105 Fed. 425; 5 A. B. R. 505;
In re Neal, 14 A. B. R. 550;
In re Sharr, 15 A. B. R. 491;
In re Washnifsky, 181 Fed. 896;
In re Staunton, 117 Fed. 507.

The following cases hold contra:

In re Falconer, 110 Fed. 111; 6 A. B. R. 557;
Bashinka v. Talbott, 119 Fed. 337;
In re Talbott, 116 Fed. 417; 8 A. B. R. 427;
In re Thompson, 140 Fed. 257;
In re Seaper, 173 Fed. 116.

These cases and the arguments advanced pro and con are considered by Remington in his work on Bankruptcy in Vol. I, pages 616 to 623.

The cases of In re Coddington and In re Falconer, supra, may be taken as the leading and most authoritative cases, respectively, for these two diverse positions. In the case of In re Coddington, Judge Archibald of the District Court of the Middle District of Pennsylvania, reviewed all the authorities on the question and in view of the diversity of opinion considered the question on principle as one of first impression. After

deciding that the matter was to be considered not from the standpoint of local law, which varies from state to state, but by reference to the provisions of the Bankrupt Act itself, he said:

> "So far as the bankrupt himself is concerned a preferential transfer is absolute and cannot be recovered back. He parts with his money or property for the benefit of the creditor to whom it is turned over, who is entitled to retain it except as the transaction is made voidable by the Bankrupt Act at the instance of the trustee or a surrender is required before participation can be had by the creditor in the rest of the estate. Manifestly, the provisions which lay ground for a recovery in either of these ways are not intended for the benefit of the bankrupt, but his general creditors, in order to secure an equal division among all. When, therefore, the trustee proceeds to reclaim, by suit or otherwise, the property which has been disposed of, he does it in the interest of creditors whom he represents, and not of the bankrupt whom—except remotely and contingently—he does not and whose act, in fact, he is seeking to undo. In view of this, it would produce a most peculiar and anomalous result if at this stage, the bankrupt could step in and assert his exemption to that which had been recovered, and thus defeat the very object for which a right of recovery is given by the act. *It is to be remembered, also, that property which the bankrupt is entitled to exempt forms no part of the estate passing to the trustee, nor does the trustee take title thereto* (Lockwood vs. Exchange Bank, 190 U. S. 294, 10 Am. B. R. 107). *Consistent with this, the bankrupt must, therefore, be the owner of the property at the time he demands his exemption out of it, and cannot extend his claim over that*

to which he has no title, except through the intervention and instrumentality of the trustee. It absolutely reverses the order, if after the trustee has successfully asserted title to the property in the hands of the preferred creditor, the bankrupt, whose rights in it were gone, can reassert them, divesting the title of the trustee and reclaiming the property to himself. * * * What he seeks to do here is to obtain the benefit of that which the creditor has surrendered (finding himself unable to retain it), to the detriment of that creditor as well as all others, the property given up being practically the whole of the estate. If this can be successfully done, a debtor who has given a preference but repents of it, can go into bankruptcy and get it back, a result hardly to be contemplated.

It is said, however, that there is a distinction to be drawn between a preference which is only recovered at the end of litigation and with expense to the estate, and one which, as here, is voluntarily surrendered at the outstart and thus passes into the hands of the trustee at once, along with the rest of the estate. But so far as the bankrupt is concerned a preference is a preference, under whatever circumstances it is given, or whatever be the outcome with regard to it. It may be so manifestly voidable that the creditor concludes to surrender it without a contest, or so related to the rest of the estate as to make it desirable for him to do so, in order to come in with the other creditors. But whatever be the case, the bankrupt is not in a position to benefit by it. *In giving the preference which he did, he parted with his rights to the property, and there is nothing to bring them into being again, whether the creditor voluntarily turns it over or is compelled to do so against his will.* In the present instance it was given up to the marshal, who

went armed with an order of the court to take it, which the creditor did not deem it advisable to resist. But by whatever means secured in this or any other case, the important thing is that it is brought about by compulsion of the Bankruptcy Act, without which the transaction could not be disturbed, the purpose being to undo the act of the bankrupt for the benefit of his general creditors, from which, therefore, he can expect to derive no benefit himself."

The Circuit Court of Appeals for the Eighth Circuit, in the case of In re Falconer, supra, sets out the contrary view, in this language:

"We are of the opinion, therefore, that Hamilton did not forfeit his right to claim his exemption out of the personal property transferred to the Bank of Clarksville, although such transfer at the time it was made operated as a preference. It was not fraudulent in fact, the conveyance having been made to secure an honest indebtedness due to the bank, but was simply voidable under the provisions of the existing bankrupt law. It ought not to be held, we think, that a transfer of personal property which is affected with no other vice than that it calls within the prohibition of the bankrupt law against preferring creditors, operates as a forfeiture or waiver of the bankrupt's right to claim such exemption as the law allows out of such property or its proceeds when it has been restored to his estate and comes into the possession of his trustee. It would certainly be a harsh rule, and one that is not consonant with the humane purpose which has led to the enactment of exemption laws, to hold that if a bankrupt make a payment or transfer property by way of security to one of his creditors, and such money or property is subsequently recovered by his trustee and becomes a part of

> his estate which the bankrupt court is called upon to administer, no part of the money or property so recovered can be set apart to the bankrupt to satisfy his claim for exemptions, although he may have no other property out of which the amount of his statutory exemption can be paid. The present bankrupt law does not make it a ground for refusing a discharge that the bankrupt has transferred property to one or more of his creditors which operates as a preference, and we perceive no adequate reason for holding that such a transfer of property places the same, or the proceeds thereof if it has been sold by a creditor, beyond the reach of a claim for exemptions when it is restored to his estate. No bankrupt should be deprived of his exemptions by a narrow and strict interpretation of laws which were passed for his benefit and prompted by a wise and humane public policy. The order made below, was, in our judgment, a proper order, and the petition to review the same is accordingly dismissed."

The opinion in the case just cited was not unanimous, Judge Sanborn dissenting. It is submitted that its reasoning does not meet the more logical and convincing reasoning of Judge Archibald in the case of In re Coddington, supra. The error of the Circuit Court of Appeals of the Eighth Circuit, we think, comes from a failure to distinguish between a fraudulent transfer and transfers which are merely voidable, such as preferential transfers and transfers for the benefit of creditors. By the direct provisions of Subdivision E of Section 67 of the Bankruptcy Act,

> "all transfers, assignments or incumbrances of his property, or any part thereof, made or

given by a person adjudged a bankrupt under the provisions of this Act, subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be *null and void* as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration."

The same section further provides

"and all property of the debtor conveyed, transferred, assigned or encumbered, as aforesaid, shall, if he be adjudged a bankrupt, *and the same is not exempt from execution, and liability for debts by the law of his domicile* be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings, or otherwise, for the benefit of the creditors."

Section 70 provides as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt *except in so far as it is to property which is exempt* to all

1. Documents relating to his property;

2. Interests in patents, patent rights, copyrights and trade-marks;

3. Powers which he might have exercised for his own benefit but not those which he might have exercised for some other person;

4. *Property transferred by him in fraud of his creditors;*

5. Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

By the very terms of the foregoing provisions, a purely fraudulent transfer made to hinder, delay or defraud creditors, is made null and void. Consequently, such a transfer conveys no title whatsoever out of the bankrupt. Since the title, therefore, at the date of adjudication, is still in him, there is no logical reason that prevents him from claiming his exemption. Further, *the very terms* of Sections 67 and 70 reserve to him the right to claim such exemption out of such property fraudulently transferred. Thus, in the second clause of Section 67, which provides that such property may be recovered by the trustee, it is stated that such property shall remain a part of the assets of the estate if *"the same is not exempt from execution and liability for debts by the law of his domicile."* By Subdivision 4 of Section 70 it is provided that such property fraudulently transferred, *"except in so far as it is property which is exempt"*, shall be vested in the trustee.

A preferential transfer or a transfer for the benefit of creditors is not only on principle, but by the very terms of the Act of a different character. Subdivision B of Section 60 provides that a preferential transfer shall be *voidable* at the instance of the trustee and that he may recover the property or its value from such person. Such

a transfer is not null and void as provided in the case of fraudulent transfer and such preferential transfers are not included in Section 70. Consequently they operate to pass the title, subject to the right in the trustee to avoid it. There is no direct provision in the Act with reference to the character of a conveyance for the benefit of creditors, it being referred to only as an act of bankruptcy. It is, however, of course, in its nature, analogous to the preferential transfer, and is merely voidable at the instance of the trustee (Section 1606, page 975, Remington on Bankruptcy).

It is submitted, therefore, that except in the one case of a fraudulent transfer, which by the very terms of the Act, is null and void, and does not affect the exemption of the bankrupt, a voluntary conveyance made by the bankrupt and wife prior to adjudication necessarily passes the title out of them and precludes them from subsequently claiming the exemption.

In conclusion the trustee contends that from any point of view the order of the District Court affirming the order of the referee in this case is erroneous. While we appreciate that the attitude of the federal courts is to be as liberal as possible in the granting of exemptions to bankrupts, it is not to be forgotten that the creditors have certain rights which should also be safe-guarded. As was very

aptly stated by Judge Sanborn in his dissenting opinion in the case of In re Falconer:

> "A debtor is legally and morally bound to pay his debts; and the rule is that all his property not expressly exempt by law is subject to appropriation by his creditors to satisfy their just demands. Exemptions constitute statutory exceptions to this rule of morals and of law. They are grants of special privileges on certain conditions, and if a debtor would avail himself of them, he must comply strictly with the conditions and pursue the terms of the grant."

It is submitted that the order of the District Court should be reversed.

Respectfully submitted,

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